

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) The Fund raises the issue of a reduction under K.S.A. 44-501(c). (While the Fund cites K.S.A. 44-510(c), the quote on page 33 of the Fund's submission letter and statements of counsel at oral argument clarify that it is the reduction under K.S.A. 44-501(c) for a preexisting functional impairment which is actually at issue.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Special Administrative Law Judge denied claimant an award for work disability granting claimant a 7 percent whole body functional impairment. This decision is based upon a finding that the respondent was at all times ready, willing, and able to accommodate claimant and that claimant voluntarily terminated his employment with respondent without appropriate justification.

Claimant met with personal injury by accident arising out of and in the course of his employment with respondent through a series of accidents from September 1, 1993, through October 13, 1993, with a stipulated final date of accident of October 13, 1993. Claimant began working for respondent as a team production member in 1989. Even though claimant had suffered preexisting back injuries while working on his farm, when he went to work for the respondent he was physically able to perform the tasks assigned. In September 1993, claimant was doing a lot of "shoveling" which was causing problems with his back. He discussed his difficulties with other team members and after a specific incident on October 13, 1993, filed an accident report for this injury.

Claimant was referred to Dr. Sharon McKinney for treatment and underwent conservative care for a period of several months. On December 6, 1993, claimant was released to work by Dr. McKinney, who opined that claimant was able to work up to 12 hours per day, 7 days a week, and who restricted claimant to limited above-the-shoulder lifting and occasional bending, twisting, turning, and squatting. On December 17, 1993, claimant contacted Dr. McKinney by telephone and advised he had experienced additional problems resulting from both working overtime and performing his normal work at home. At that time, Dr. McKinney recommended claimant be restricted from working beyond 40 hours per week but eliminated the restrictions against squatting, twisting, and turning. Dr. McKinney felt that claimant had reached maximum medical improvement on March 11, 1994. At that time she suggested claimant lift no weights over 40 pounds and advised that he not work more than 8 hours per day, 40 hours per week. Dr. McKinney assessed claimant a 7 percent whole body functional impairment, 5 percent of which was

from degenerative disc changes and 2 percent from claimant's decreased hip extension.

Respondent continued to accommodate claimant's limitations. However, claimant concluded that he was unable to properly perform his job and felt, with his limitations, it was in his best interest to terminate his employment with respondent, which he did in May 1994. Claimant, after terminating his employment, began attending law school full time.

K.S.A. 44-510e states in part:

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

When claimant was returned to work with respondent at an accommodated position he was earning in excess of 90 percent of his pre-injury average weekly wage. However, as of December 17, 1993, when Dr. McKinney restricted claimant to 8 hours per day, 40 hours per week, claimant's average weekly wage dropped below this 90 percent statutory boundary. At that time claimant became eligible for a work disability under K.S.A. 44-510e.

K.S.A. 44-510e further states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

In reviewing the evidence in the record, the Appeals Board has had the opportunity to consider the deposition testimony of Dr. Sharon McKinney, Dr. Vernon J. Peterson, Dr. Robert R. Payne, Dr. Rex A. Wright, and Dr. David K. Ebelke. The Appeals Board has further considered the opinions of Michael J. Dreiling and Richard W. Santner, both vocational experts, regarding the claimant's loss of ability to perform tasks that the claimant had performed in substantial gainful employment during the 15-year period preceding the accident. Dr. Ebelke was provided a list of essential tasks and determined claimant unable to perform 4 of the 36 tasks listed. In addition, he cautioned that claimant should be given latitude to attempt and, based upon that experience, determine whether he could perform another 6 of the tasks listed. The remaining 26 tasks were within claimant's ability. Dr. Ebelke also had the opportunity to review the task analysis of Mr. Dreiling and felt

claimant unable to perform 6 of the 36 tasks listed and questioned claimant's ability to perform 5 others. Dr. McKinney, after reviewing the task list performed by Mr. Santner, felt claimant could no longer perform 16 of the 24 tasks listed. In considering the task opinions of the various physicians, the Appeals Board finds claimant has suffered a task loss of 39 percent.

While the Appeals Board acknowledges claimant's income shifted dramatically in May 1994 when claimant terminated his employment with respondent, the Appeals Board nevertheless finds claimant was able to earn 89 percent of his pre-injury average weekly wage and the termination of his employment was a voluntary act on claimant's part. Respondent had exhibited a clear intent and willingness to accommodate claimant within the treating doctor's restrictions. Therefore, claimant is found to have suffered an 11 percent loss of ability to earn wages. See Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

In addition, the Kansas Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), required a good faith effort on the part of the claimant to find post-injury employment or the finder of facts was directed to determine an appropriate post-injury wage based upon the evidence in the record. Here, claimant terminated his employment with respondent which was paying him 89 percent of his pre-injury wage and returned to law school. There was no effort on claimant's part thereafter to obtain any type of employment. The Appeals Board, therefore, finds claimant in violation of Copeland and the 89 percent earning ability displayed by claimant should be imputed for purpose of figuring claimant's work disability.

In considering both the claimant's loss of ability to perform work tasks averaged with the difference between claimant's pre-injury average weekly wage and post-injury earnings, the Appeals Board finds claimant has suffered a work disability of 25 percent.

The Kansas Workers Compensation Fund contends respondent and the Fund are entitled to a credit pursuant to K.S.A. 44-501(c) which states in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

This issue was neither listed in the Award nor decided by the Special Administrative Law Judge at the time of the final award. In reviewing the regular hearing, the Appeals Board fails to find that this issue was designated as an issue at the time of regular hearing. The Appeals Board has held in the past that issues raised for the first time on appeal are in contravention to K.S.A. 1997 Supp. 44-555c and will not be considered. As such, the Fund's appeal on this issue is dismissed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris dated December 12, 1996, should be, and is hereby, modified and claimant is granted an award against the respondent, a qualified self-insured, and the Kansas Workers Compensation Fund for a 25% permanent partial disability to the body as a whole.

Claimant is awarded 103.75 weeks permanent partial disability compensation at the maximum statutory rate of \$313 per week for a total award of \$32,473.75, all of which is due and owing at the time of this award and ordered paid in one lump sum minus amounts previously paid.

Claimant is further entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and the Kansas Workers Compensation Fund to be paid per the stipulation of the parties as follows:

Appino & Biggs Reporting Service	
Deposition of Douglas Fisher	Unknown
Deposition of Douglas Fisher	\$302.80
Deposition of Douglas Fisher	471.70
Deposition of Richard W. Santner	388.25
Deposition of Sharon McKinney, D.O.	437.65
Deposition of Vernon Peterson, M.D.	146.90
Deposition of Robert R. Payne, M.D.	353.00
Deposition of Rex A. Wright, D.C.	167.40
Deposition of Paul Hackett	311.60
Deposition of Cathy W. Hanley	267.00
Deposition of Tom R. Kimery	151.10
Deposition of Michael J. Dreiling	508.45
Deposition of David K. Ebelke, M.D.	300.40
 Curtis, Schloetzer, Hedberg, Foster & Associates	
Transcript of regular hearing	349.23

Special Administrative Law Judge's Fee

150.00

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the award of the majority in the above opinion.

Claimant was returned to work with respondent within specific restrictions of the treating doctor and respondent met those restrictions willingly. The limitation placed upon claimant that he not be allowed to work more than 40 hours per week was a limitation which stemmed not only from claimant's work-related injury but from activities associated with claimant's continued work on his farm. This was work which claimant did in the evenings and on weekends, outside of his normal work activities. It is significant that claimant's original back injury was suffered in 1988 while claimant was working on the farm and the injury to claimant at respondent's place of employment was an aggravation of this preexisting condition.

It is further significant that while claimant was limited to working 40 hours per week by Dr. McKinney, claimant regularly violated this restriction by continuing to work evenings and weekends on the farm doing physical manual labor.

It is this Appeals Board Member's opinion that claimant has failed to prove his entitlement to a work disability and should be limited to the functional impairment awarded claimant in the amount of 7 percent to the body as a whole pursuant to the rating provided by Dr. Sharon McKinney, the treating physician, and based upon the principles of Foult and Copeland, *supra*.

This claimant should not be allowed to rely upon medical limitations to receive a substantial work disability when claimant regularly violates those limitations in his own personal life.

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Billy E. Newman, Topeka, KS
Darin M. Conklin, Topeka, KS
Philip S. Harness, Director